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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LEE SMITH, Defendant and Appellant.	E069348 (Super.Ct.No. SWF10000490) OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge. Reversed with directions.

Bases & Bases and Arielle Bases for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Allison V. Acosta and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Lee Smith appeals after the trial court denied his Proposition 47 petition for resentencing on the ground he "pose[d] an unreasonable risk of danger to public safety." (See Pen. Code, § 1170.18, subds. (a)-(c), unlabeled statutory citations refer to this code.) Proposition 47 defines an unreasonable risk of danger to public safety as "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [section 677, subdivision (e)(2)(C)(iv)]." (§ 1170.18, subd. (c).) Section 677, subdivision (e)(2)(C)(iv) "enumerates a narrow list of super-strike offenses such as murder, rape and child molestation," and contains a catchall for serious or violent felonies "punishable in California by life imprisonment or death." (*People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1310 (*Hoffman*); § 667, subd. (e)(2)(C)(iv)(VIII).)

Smith argues the record does not support the court's finding he was likely to commit such an offense, and we agree. Except for three remote robbery offenses in 1986 and 1991, which occurred when he was 18 and 23, Smith's criminal record consists of nonviolent drug and property crimes. The trial court was troubled by the seriousness of his robbery convictions and his long history of resistance to authority; however, Proposition 47's definition of unreasonably dangerous is reserved only for those likely to commit a super strike or a violent felony that carries a punishment of life imprisonment. (*Hoffman*, *supra*, 241 Cal.App.4th at pp. 1309-1310.) Because the record does not support the court's finding Smith poses an unreasonable risk of committing that kind of offense, we reverse and direct the trial court to grant the petition. (*People v. Hernandez* (2017) 10 Cal.App.5th 192 (*Hernandez*).)

I

FACTS

On March 8, 2010, Smith passed counterfeit bills in two commercial establishments, Check Exchange and Staples. According to the People's filings in the trial court, Smith and a female collaborator entered a Check Exchange in Hemet and attempted to purchase a money order using three low-quality counterfeit hundred-dollar bills. When confronted, they fled the store, but left behind one of the bills. Later the same day, Smith passed a counterfeit $100 bill at a Staples and left the store.

On July 2, 2010, the Riverside County District Attorney charged him by information with two counts of second degree commercial burglary (§ 459) and one count of possessing or passing counterfeit bills (§ 476). On January 12, 2011, he pled guilty to all three felony counts and is currently serving a sentence of 13 years 4 months for those offenses, as enhanced.[1]

On November 19, 2014, Smith petitioned to have the three felony convictions reduced to misdemeanors under the then recently enacted Proposition 47. (§ 1170.18, subds. (a) & (b).) Smith signed his petition under penalty of perjury, declaring the value of the property did not exceed $950. (*People v. Smith* (2016) 1 Cal.App.5th 266, 270 (*Smith*).) The People conceded Smith was eligible for resentencing on counts 1 and 3, but requested a hearing in connection with the conviction for burglary of Check

[1] The trial court stayed the sentence on the Staples burglary conviction because it related to the counterfeit bill conviction.

Exchange. (*Ibid.*) They said the "People do not believe count one is eligible as [Check Exchange] is not a commercial establishment" and requested a hearing to determine resentencing on that count. (*Ibid.*)

The trial court denied Smith's petition on the ground the convictions under sections 476 and 459 were not qualifying felonies, but without further explanation. (*Smith, supra,* 1 Cal.App.5th at p. 270.) In an earlier appeal, we reversed the trial court's denial, concluding both the Check Exchange and the Staples are commercial establishments and Smith had met his initial burden of showing the value of the property did not exceed $950.[2] (*Id.* at pp. 273-276.) We remanded for the trial court to determine whether Smith satisfied the conditions for eligibility. (*Id.* at pp. 275-276.) The Supreme Court granted review and then dismissed the petition after deciding in *People v. Gonzales* (2017) 2 Cal.5th 858 that entering a bank or other financial institution to cash forged checks is misdemeanor shoplifting. We issued remittitur on July 7, 2017.

On September 28, 2017, the trial court held a new hearing on Smith's petition which focused on whether he should be denied resentencing on the ground of his dangerousness. The People apparently again conceded Smith's convictions were eligible for reduction to misdemeanors, but filed an opposition based on the argument resentencing him would pose an unreasonable risk of danger to public safety. They

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[2] The Attorney General argued in the first appeal that we should affirm the order denying resentencing because Smith didn't "show that . . . the value of what he took in each burglary did not exceed $950." It's now clear they made this argument despite having information readily available showing the property did not exceed $950. We disapprove of such tactics.

supported their position by recounting Smith's prior criminal record and behavior in prison. They argued Smith's background demonstrated he was likely to commit a serious or violent felony if released. What follows is a summary of Smith's background as described in the People's opposition. We rely on their description of Smith's prior offenses and his behavior while in custody as the underlying police reports and prison records are not in the appellate record.

As noted, Smith has three robbery convictions on his record—for offenses in 1986 and 1991. According to the People's description of the police reports, in the morning of April 26, 1986, when he was 18 years old, Smith tried to snatch a purse from a 66-year-old woman at a Greyhound station in Pomona. He approached the victim from behind, grabbed her purse and pulled her to the ground. The victim injured her hip in the fall. Smith attempted to flee, but several witnesses detained him and police officers arrested him.

On September 2, 1991, when Smith was 23 years old, he committed two armed robberies in quick succession. First, he approached a victim who was getting out of his vehicle. Smith pointed the gun at the victim and demanded his money and wallet. When the victim started to refuse, he chambered a round into the gun and repeated his demands. A short time later, Smith followed a second victim into a parking lot. He pointed a gun at the victim and told him to get out of the car. The victim complied and Smith drove away in the vehicle. The remainder of Smith's criminal record consists of four drug convictions from 1987, 1988, 1997, and 2004.

Smith has spent decades in custody. The People highlighted 29 instances from his disciplinary record as evidence of his dangerousness: participation in a gang related attack (1986); claiming to be an ex-gang member during an interview (1988); delaying lockup by failing to enter his cell when ordered (1988); sleeping at a job site (1989); failing to report to work (1989); showing disrespect to staff (1989); attempting to burn a shed at his workplace (1989); speaking to staff in a threatening manner (1989); possessing tattooing paraphernalia (1993); burning trash (1994); claiming gang association (1994); being put in administrative segregation when he claimed his life had been threatened (1994); playing his radio or television too loudly (1994); possessing alcohol (1995); leaving assigned area (1997); engaging in an inmate fight (1998); obstructing view into his cell (1999); failing to report to work (1999); participating in two fistfights (1999); refusing to obey an order to move to a new building (1999); showing disrespect to staff (1999); failing to report to work (2000); testing positive for THC (2001); showing disrespect to staff (2007); taking an unallotted phone call (2011); engaging in an inmate fight and refusing to comply with guard orders to stand down (2015); being put in administrative segregation when he claimed he recognized a pre-incarceration enemy (2016); possessing a cellular phone (2016); and possessing a wireless device component (2016-2017).

In addition, the People relied on Smith's behavior while on parole. Again, these details come from their opposition to resentencing in the trial court and are not supported by the record on appeal. The People represented Smith failed to check in while on parole

in 2003 and 2004; threatened his wife in 2005 and had his parole revoked; stole a car, money, and a cell phone from someone who knew him in 2008; and, in 2009, failed to contact a parole agent after the agent tried to visit him at his legal residence.

The People argued Smith's criminal history "proves the defendant cannot live in society, free from custody, without violating the law." They emphasized the seriousness of his robbery convictions, his assault on the first victim, his possession of a gun in the two other offenses, and the fact he had "continuously reoffended shortly after being released from custody" to conclude he "poses an unreasonable risk of danger to public safety and will likely commit a 'super strike.'"

Smith relied on his recent rehabilitation efforts to support a finding he does not pose such a risk. He explained he had only recently been convinced he needed to try to change his ways. "This is the first time I ever took the initiative to do some things. In 2014 before my mother passed, she told me I needed to change the ways I was. So I went back to school. I got my GED. I took up a trade. I graduated from this construction class, and then I became a TA in the construction class, and then after that I completed two AVPs, Alternative Violence Program, and then I completed a STAT program, and NA, and AA. Right now I just started up a CGA, a Criminal and Gangs Anonymous, because I struck away from the gangs, and I'm in Criminal Thinking right now. If you look at my file, you'll see all that in the last four years, you know. This is the first time I ever tried to do something different with my life, and it ain't that hard. It's just that when I was young, I didn't care."

The court accepted Smith's representations as reflecting his real commitment to change. "Well, and I think you're absolutely sincere about that, Mr. Smith. And I want to tell you that this decision that Mr. Oliver told you where I was headed, it's a very difficult decision for me because your counsel, Mr. Oliver, did an excellent job of providing me with that information. You're—you're amplifying some of that information today and, as I said, I believe you're sincere in what you've told me."

Nevertheless, the trial court held Smith was not eligible for resentencing under section 1170.18, subdivision (a) because he posed a risk of committing a super strike offense. The court explained, "the problem I have—and these are very—what word do I want to use?—poorly worded standards that the Court has been given from above in terms of how we evaluate these cases, Mr. Smith. But the bottom line is this: Sir, many years ago—and I do grant you it's been 20 to 25, 30 years ago—you committed three very violent felonies. All robberies, they increased in seriousness. The first robbery did not involve the use of a gun; the last two robberies—and, again, they take place on the same date, I realize that. The last two robberies involve the use of a gun, which made you from a very early age a three-strike offender. You spent most of the last 20 years incarcerated, and you had a difficult time obeying the commands of authority in those places. A lot of your infractions were not of major—were not major infractions, but they did involve not complying with authority. Even the most recent—the prison fight you had in 2015, just a couple years ago. Again, I certainly—and Mr. Oliver had already indicated this to me, and I agree with that. I don't characterize the way the prison does as

an incitement to riot. I know prison fights can be common, that can happen. But in that situation it wasn't so much the fight itself and whether it resulted in a riot or not; it was that you didn't comply with the request to stop. You didn't comply with authority in those situations. Frankly, that puts everyone at risk in those situations. It puts the staff at risk. It puts the inmates at risk . . . You're a three-strike offender and you don't comply with authority and you engage in—when you get released, you engage in occupations that, by their nature, they are dangerous. The most recent one was . . . [¶] [passing a] counterfeit bill . . . But he has drug offenses also in his past . . . You absconded from parole, and so you're out in the community without any benefit of structure, and, again, you didn't follow authority in that situation"

After reviewing this evidence and hearing argument from the parties, the trial court found Smith unreasonably dangerous and denied the petition. The court based its decision on Smith's robbery offenses from 26 and 31 years earlier and his failure to obey authority in prison as well as on parole. While conceding Smith's strike convictions were remote in time, the court emphasized the seriousness of those offenses. The court remarked "I think, again, it's a close call," but concluded Smith was "always at a risk of committing a new violent offense," and found him to be "an unreasonable risk to danger of public safety."

The only issue on appeal is whether this ruling was proper.

II

ANALYSIS

Proposition 47 allows a person currently serving a sentence on a qualifying felony conviction to petition the trial court to reduce the conviction to a misdemeanor and resentence them under the applicable new or amended code provision. (Pen. Code, § 1170.18, subd. (a).) A petitioner with a qualifying felony is not entitled to those benefits, however, if the trial court finds they pose "an unreasonable risk . . . [of] commit[ting] a new violent felony within the meaning of [Penal Code section 677, subdivision (e)(2)(C)(iv)]." (Pen. Code, § 1170.18, subds. (b) & (c).) The offenses listed in Penal Code section 677, subdivision (e)(2)(C)(iv) are: (1) any offense defined as "sexually violent" under Welfare and Institutions Code section 6600, subdivision (b); (2) oral copulation, sodomy, or sexual penetration of a child; (3) a lewd or lascivious act involving a child; (4) any homicide or attempted homicide; (5) solicitation to commit murder; (6) assault with a machine gun on a peace officer or firefighter; (7) possession of a weapon of mass destruction; and (8) "[a]ny serious and/or violent felony offense punishable in California by life imprisonment or death." These disqualifying offenses are commonly referred to as "super strikes." (*People v. Sledge* (2017) 7 Cal.App.5th 1089.) They are evidently *very* serious assaultive offenses.

The prosecution bears the burden of proving the petitioner is unreasonably dangerous by a preponderance of the evidence. (Evid. Code, § 115; *People v. Jefferson* (2016) 1 Cal.App.5th 235, 241-242 [concluding because Pen. Code, § 1170.18 does not

state the standard of proof required for a dangerousness finding, preponderance standard applies under Evid. Code, § 115].) When making this determination, the trial court may consider the petitioner's criminal conviction history, custodial disciplinary record, record of rehabilitation, and any other evidence it deems relevant. (Pen. Code, § 1170.18, subd. (b).)

We review a trial court's ruling on dangerousness for abuse of discretion. (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1264 (*Hall*).) A court abuses its discretion when it makes an arbitrary or capricious decision, for example, by applying the wrong legal standard or making an express or implied factual finding based on insufficient evidence. (*Ibid.*; *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1055.)

Having reviewed the record in this case, we are unable to identify a sufficient factual basis for the trial court's determination that Smith poses an unreasonable risk of committing a super strike if resentenced. As the trial court observed, Smith is a serial offender who demonstrated difficulty obeying authority until he entered middle age. However, Smith has never committed a super strike, his three most serious offenses are two and a half to three decades old, and involved battery and threats of violence. In considering his criminal record, we find the analysis of dangerousness in *Hall* instructive.

In *Hall*, the defendant was serving a sentence for a 2013 conviction for grand theft from a person (§ 487, subd. (c)), the circumstances of which were serious. The defendant followed the female victim one evening, pushed a knife against her stomach and threatened to kill her, then ripped her purse from her shoulder and ran off. (*Hall*, *supra*,

247 Cal.App.4th at p. 1259.) The defendant's lengthy criminal record also contained robbery convictions from 2002 and 2012. As he did in 2013, the defendant had threatened to kill the victim during the 2012 robbery. (*Id.* at pp. 1265-1266.) After the passage of Proposition 47, the defendant petitioned to have his grand theft from a person conviction reduced to a misdemeanor, but the trial court found he posed an unreasonable risk of danger to public safety because the chronology of his offenses showed "a continual and consistent escalation" in seriousness. (*Hall*, at pp. 1260, 1264.) Our colleagues in the First District, Division Five upheld the trial court's finding for the same reason, pointing out the defendant had consistently committed crimes for over two decades and his "most recent offenses [were] the most concerning." (*Id.* at p. 1266.) The *Hall* court concluded the defendant's criminal record demonstrated he was "becom[ing] increasingly violent," and as a result supported the inference "he presents an elevated—and escalating—risk of not only threatening violence, but also using deadly force." (*Id.* at pp. 1265-1266.)

Our case involves the opposite type of offender, one whose criminal behavior has been steadily decreasing in seriousness. We acknowledge the seriousness of Smith's robbery convictions, but in doing so we cannot overlook their remoteness and his young age at the time of the offenses. Since the two robberies in 1991 where Smith threatened two men with a gun to obtain property, his offenses have been limited to drug and property crimes. His most recent crimes, the ones he seeks to have reduced to misdemeanors, are for passing counterfeit bills. In *Hall*, the defendant's most recent

crime, and the subject of the resentencing petition, was a violent theft that involved the threat of death and use of a deadly weapon. The facts of *Hall* and the very different circumstances in this case counsel us to conclude Smith is not unreasonably dangerous.

Though Smith also has a long track record of disciplinary infractions in prison, most of them are petty—not showing up for work, playing a television or radio too loud, possessing alcohol, talking back to authority, taking an unauthorized phone call, and possession of wireless devices. There is no sensible way to view these events as in any way predictive of Smith committing a sexually violent offense, child molestation, homicide, solicitation of murder, assault with a machine gun on a police officer or a firefighter, or possession of a weapon of mass destruction.

We also believe the trial court gave too little weight to Smith's efforts, since he began his latest stint in prison, to address his previous behavior problems. In that time, he's obtained a GED, trained for a trade, and participated in multiple substance abuse programs. During the same period, he was involved in only one serious infraction; he participated in a prison fight. We conclude the trial court abused its discretion by concluding Smith's record indicated he posed an unreasonable risk of danger to public safety.

As our colleagues in the Second District explained in *Hoffman*, by tying the definition of dangerous to the "narrow list" of super strikes in section 667, subdivision (e)(2)(C)(iv), Proposition 47 "withholds its benefits from 'rapists, murderers, molesters and the most dangerous criminals,' but not from other offenders." (*Hoffman*, *supra*, 241

Cal.App.4th at p. 1310.) "For example, even if the judge finds that the inmate poses a risk of committing crimes like kidnapping, robbery, assault, spousal abuse, torture of small animals, carjacking or felonies committed on behalf of a criminal street gang, Proposition 47 requires [his or her] release." (*Id.* at pp. 1310-1311.) Even if, as the trial court believes, it is likely Smith would commit another offense, the record contains no evidence the future offense would be a *super strike*.

The ruling cannot be salvaged by the chance Smith will commit another offense, less serious than a super strike, but one that would carry an indeterminate sentence under the "Three Strikes" law. That path to a life sentence does not qualify the predicate offense as a serious and/or violent felony offense punishable in California by life imprisonment or death under section 667, subdivision (e)(2)(C)(iv).

In *People v. Thomas* (1999) 21 Cal.4th 1122, 1127 (*Thomas*), our high court faced the question whether section 667.5, subdivision (c)(7)'s definition of "violent felony" as "[a]ny felony punishable by death or imprisonment in the state prison for life" referred to felonies that *themselves* carry life sentences—such as aggravated kidnapping (§ 209)—or, as the Attorney General argued, referred more expansively to any felony punishable by life imprisonment *under the three strikes law*. (*Thomas*, at p. 1127.) The Court rejected the Attorney General's interpretation as overbroad because it would sweep all third strike offenses—including the nonviolent ones—into the definition of a violent felony. (*Ibid.*) The Court found it was "appropriate to limit" section 667.5's definition of violent felony "to defendants whose current offenses, in and of themselves, and without

reference to the punishment accorded under the three strikes law, are violent." (*Thomas*, at p. 1129.) Thus, it concluded the phrase "punishable by . . . imprisonment in the state prison for life" in section 667.5 refers to an "offense that *itself* carries a punishment of life imprisonment," not one that carries a life sentence "merely due to [the offender's] status as a recidivist." (*Thomas*, at p. 1127, italics added.)

In *Hernandez*, the Sixth District applied *Thomas's* holding to the provision at issue here—section 667.5, subdivision (e)(2)(C)(iv)(VIII). (*Hernandez*, *supra*, 10 Cal.App.5th at pp. 201-202.) Proposition 47 disqualifies those who have suffered "one or more prior convictions for an offense specified in [section 677, subdivision (e)(2)(C)(iv)]" from its resentencing and reclassification benefits. (§ 1170.18, subd. (i).) The defendant in *Hernandez* had been convicted of second degree robbery in 1997 and, because that offense was his third strike, had received an indeterminate term of 25 years to life in prison. (*Hernandez*, at p. 195.) The Attorney General argued the defendant's robbery conviction disqualified him for resentencing. (*Id.* at pp. 198-199.) Relying on our high court's reasoning in *Thomas*, the court concluded the phrase "means an offense that itself has an associated statutory punishment of life imprisonment or death, not an offense such as robbery, which has an associated statutory punishment of two, three, or five years." (*Hernandez*, at p. 202.) "An offense such as robbery is not converted to an 'offense punishable in California by life imprisonment or death' (§ 667, subd. (e)(2)(C)(iv)(VIII)) by virtue of the fact that the particular offender has two prior serious or violent felony convictions." (*Ibid*.) Following this precedent, we reject that interpretation of

"punishable . . . by life imprisonment" and hold the final entry in section 677, subdivision (e)(2)(C)(iv)'s list of super strikes refers to offenses carrying life sentences on their own, not by way of a recidivist statute.

We understand the court's hesitation to resentence Smith. Its concerns about his inability to remain a law-abiding citizen and resistance to authority through much of his adult life are valid, however, they are not grounds for withholding from him the benefits of Proposition 47. As the *Hoffman* court noted, Proposition 47 is unlike the three strikes law, which "gives a judge sentencing leeway" to strike a prior conviction if it "finds defendant is 'outside the scheme's spirit.'" (*Hoffman*, *supra*, 241 Cal.App.4th at p. 1311.) "That is not the case with Proposition 47 . . . The 'criteria' for resentencing are explicitly stated in section 1170.18, subdivision (a), and 'unreasonable risk' is defined in subdivision (c). If the criteria are met, and the resentencing does not pose an unreasonable risk of a *new super-strike offense*, the 'felony sentence *shall* be recalled and the petitioner resentenced to a misdemeanor.'" (*Ibid.*, italics added.) Here, the record supports, at most, a finding Smith poses some risk of committing another robbery, theft, or drug offense, but it does not support a finding that he poses a risk of committing a super strike. As such, he does not fall under the narrow category of criminals Proposition 47 defines as unreasonably dangerous.

III

DISPOSITION

We reverse the order denying Smith's petition for resentencing on the ground he poses an unreasonable risk of danger to public safety and direct the trial court to grant his petition.

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SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.